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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JOSE AHUMADA-RODRIGUEZ,

14 Defendant.
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CASE NO. CR09-5601BHS

ORDER DENYING
DEFENDANT'S MOTION
TO DISMISS COUNTS 1
AND 2.

17 This matter comes before the Court on Defendant's Motion to Dismiss Counts 1 &
18 2 (Dkt. 39). The Court has considered the pleadings filed in support of and in opposition
19 to the motion and remainder of the file and hereby denies the motion for the reasons
20 stated herein.

21 **I. PROCEDURAL HISTORY**

22 On September 1, 2009, the Government filed a Complaint against Defendant Jose
23 Ahumada-Rodriguez alleging that Defendant committed the offenses of Possession with
24 Intent to Distribute Cocaine and Possession with Intent to Distribute Heroin in violation
25 of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2. Dkt. 1.

26 On September 10, 2009, a grand jury returned an Indictment against Defendant for
27 the same two charges. Dkt. 26.
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ORDER

1 On October 6, 2009, Defendant filed a Motion to Dismiss Counts 1 & 2. Dkt. 39.
2 On October 12, 2009, the Government responded. Dkt. 40. On October 14, 2009,
3 Defendant replied. Dkt. 41. On October 15, 2009, Defendant Mario Alberto Herrera-
4 Perez joined in the motion. Dkt. 42.

5 II. FACTUAL BACKGROUND

6 The allegations in the Indictment are as follows:

7 On or about July 29, 2009, in Clark County, within the Western
8 District of Washington, and elsewhere, SAUL AGUILAR-SAGUN,
9 MARIO ALBERTO, HERRERA-PEREZ, and JOSE
10 AHUMADA-RODRIGUEZ knowingly and intentionally did possess with
the intent to distribute, and aid and abet the possession with intent to
distribute, cocaine, a substance controlled under Schedule II, Title 21,
United States Code, Section 812.

11 The Grand Jury further alleges that this offense involved one
kilogram or more of a substance or mixture containing cocaine.

12 On or about July 29, 2009, in Clark County, within the Western
13 District of Washington, and elsewhere, SAUL AGUILAR-SAGUN,
14 MARIO ALBERTO, HERRERA-PEREZ, JOSE
15 AHUMADA-RODRIGUEZ knowingly and intentionally did possess with
the intent to distribute, and aid and abet the possession with intent to
distribute, heroin, a substance controlled under Schedule I, Title 21, United
States Code, Section 812.

16 The Grand Jury further alleges that this offense involved one
kilogram or more of a substance or mixture containing heroin.

17 Dkt. 26 at 1-2.

18 III. DISCUSSION

19 Under Fed. R. Crim. P. 12, a party must bring a pretrial motion to challenge “a
20 defect in the indictment or information” Fed. R. Civ. P. 12(b)(1)(B). An indictment
21 will withstand a motion to dismiss:

22 if it contains the elements of the charged offense in sufficient detail (1) to enable
23 the defendant to prepare his defense; (2) to ensure him that he is being prosecuted
24 on the basis of the facts presented to the grand jury; (3) to enable him to plead
double jeopardy; and (4) to inform the court of the alleged facts so that it can
determine the sufficiency of the charge.

25 *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994) (quotation omitted). Moreover,
26 the Supreme Court has held that it is acceptable for an indictment to set forth the offense
27 in the language of the statute itself provided that the language clearly sets forth all the
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1 requisite elements of the offense without ambiguity. *Id.* (citing *Hamling v. United States*,
2 418 U.S. 87, 117 (1974)). Rule 12(b), however, should not be invoked so as to require
3 the court to, in effect, prematurely rule on the sufficiency of the evidence. *United States*
4 *v. Nukida*, 8 F.3d 665, 669-670 (9th Cir. 1993) (motion to dismiss for lack of interstate
5 commerce nexus premature; government had right to present case to jury and judge).

6 In this case, Defendant challenges the sufficiency of the evidence. Defendant
7 argues that “there is no evidence that Mr. Ahumada-Rodriguez had actual possession of
8 any cocaine or heroin” and that the “evidence is also insufficient to establish that Mr.
9 Ahumada-Rodriguez had constructive possession of the drugs or the cash.” Dkt. 39 at 5.
10 This is not a proper issue for a Rule 12(b) motion. *See Nukida, supra*. The Government
11 has the right to present its case against Defendant. Therefore, the Court denies
12 Defendant’s motion to dismiss.

13 IV. ORDER

14 Therefore, it is hereby **ORDERED** that the Defendant’s Motion to Dismiss Counts
15 1 & 2 (Dkt. 39) is **DENIED**.

16 DATED this 19th day of October, 2009.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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